United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

77-7201

Argued by
JAMES J. FINNERTY, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, Deceased,

Plaintiff-Appellant,

vs.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants-Appellees.

BRIEF OF DEFENDANT-APPELLEE HAWKER SIDDELEY AVIATION, LTD.

MENDES & MOUNT
Attorneys for Defendant-Appellee Hawker Siddeley Aviation, Ltd.
Office & P.O. Address
27 William Street
New York, N.Y. 10005
212—344-7100

JAMES J. FINNERTY, JR.
Of Counsel

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vs.

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Defendants-Appellees.

BRIEF OF DEFENDANT-APPELLEE HAWKER SIDDELEY AVIATION, LTD.

Issues Presented for Review

1. Does the Warsaw Convention create a cause of action for wrongful death.

2. Does a District Court have original jurisdiction under 28 U.S.C. § 1331(a), over a cause of action for wrongful death pleading the Warsaw Convention.

3. Is the negligence alleged a tort only, committed in violation of the law of nations or a treaty of the United States.

4. Does the instant claim involve a substantial Federal issue sufficient to warrant pendent/ancillary jurisdiction over Hawker Siddeley Aviation, Ltd.

Statement of Facts

Plaintiff's original complaint alleged jurisdiction by reason of diversity of citizenship. Plaintiff claimed that he and the decedent were *citizens* of the State of California (App. 1). At his oral deposition which was conducted on October 1, 1976, pursuant to an Order of the lower Court, obtained by reason of his failure to earlier appear, Mr. Benjamins admitted that both he and his deceased wife were Dutch citizens. In fact, both regularly travelled to their homeland.

Defendants promptly moved to dismiss the complaint for lack of diversity jurisdiction. On the return day of the motions, plaintiff filed a motion for leave to serve an amended complaint, pleading for the first time, jurisdiction under 28 USC § 1331, 1337 and 1350. The claim that the instant case comes within 28 USC 1337, i.e. the Federal commerce provisions or the Federal Aviation Act has since been abandoned.

In early January 1977, almost three years after filing of the original complaint, and five years from accrual of the cause of action, plaintiff filed a second amended complaint, pleading a loss of baggage claim of $1,000.00.

The District Court dismissed the original and amended complaints for lack of jurisdiction.

POINT I

The Warsaw Convention does not create a cause of action for wrongful death.

Plaintiff urges that the instant issue is of first impression. A pragmatic view of the cases leads to the opposite conclusion.

The Circuit Court in *Komlos* v. *Campagnie Nationale Air France,* 111 F.Supp. 393, rev'd on other grounds, 209 F.2d

436 (2nd Cir. 1953), clearly faced the present issue, as Judge Leibell unequivocally stated:

> "I am of the opinion that the Warsaw Convention does not create a right of action for wrongful death. The Convention creates a presumption of liability from the happening of the accident. Art. 17. . . ."

Shortly thereafter, in *Noel* v. *Linea Aeropostal Venezolana,* 247 F.2d 677, 679 (2nd Cir. 1957), the Circuit Court, presented with plaintiff's argument that Warsaw created a cause of action, held:

> ". . . that the Convention did not create an independent right of action. . . . As one authority has stated, the purpose of the convention was only 'to effect a uniformity of procedure and remedies'. . . ."

Accord:

Wyman v. *Pan American Airways,* 43 N.Y.S. 2d 420, aff'd 293 N.Y. 878, 59 N.E. 2d 785 (1944);
Sheris v. *The Sheris Co.,* 12 Avi 17, 394 (Va. 1972);
Orr, *The Warsaw Convention,* 31 Va. L. Rev. 423 (1945).

In *Zousman* v. *Canadian Pacific Air Lines, Ltd.,* 307 F. Supp. 892, 899 (SD NY 1969), the Court in considering a motion to remand wherein defendant argued that the cause of action pleading "Warsaw" is one "arising under the laws and treaties" of the United States, held:

> ". . . However, it is the rule of this Court that the Warsaw Convention does not in and of itself create an independent cause of action. . . ."

Twenty years later in *Husserl* v. *Swiss Air Transport Co. Ltd.,* 351 F.Supp. 702, aff'd 485 F.2d 1240 (2nd Cir.

1973), this Circuit affirmed not only that portion of Judge Tyler's opinion which held that a hijacking was an "accident" under Warsaw, but also that portion wherein he stated, inter alia:

> ". . . Indeed, it has been held that the Convention creates no new right of action, but rather creates '. . . a presumption of liability, leaving it for local law to grant the right of action. . . ."

Judge Tyler reaffirmed his holding in the second *Husserl* v. *Swiss Air Transport Co. Ltd.*, decision, 388 F.Supp. 1238, 1251 (SD NY 1975), when he again stated:

> "It has been noted earlier that the Warsaw Convention did not create any cause of action."

Interestingly, plaintiff in *Zousman* v. *Canadian Pacific Air Lines, Ltd., supra,* p. 495, argued that a ". . . claim based on the Warsaw Convention does not 'arise under' a treaty of the United States. . . ." There, plaintiff was represented by Kreindler & Kreindler, who is also "of counsel" in the case at bar. See Kreindler, *Aviation Accident Law,* Vol. 1, Rev. Sec. 11.08, p. 11-53.

Lastly, plaintiff argues that the second amended complaint (baggage loss) states a cause of action under Article 18. Clearly, the requisite jurisdictional amount is absent, and therefore, the Court would not have jurisdiction. *Komlos* v. *Compagnie Nationale Air France, supra.*

POINT II

Wrongful death action under Warsaw Convention does not confer original jurisdiction under § 1331(a).

It is well established that subject matter jurisdiction is an absolute prerequisite for the commencement of an action in the District Court, and in the absence of same, the Court must dismiss the action. *Amundson* v. *United*

States, 279 F.Supp. 779 (SD NY 1967); Rule 12(h)(3). Also, it is beyond dispute that 28 U.S.C. § 1332 does not confer jurisdiction in suits between aliens. *Hodgson* v. *Bower Bank,* 5 Cranch 303, 3 L.Ed. 108 (1809); *Willems* v. *Barclays Bank, D.C.O.,* 263 F.Supp. 774 (SD NY 1966). And plaintiff, as the party asserting jurisdiction, carries the burden of proving all jurisdictional facts. *David Crystal Inc.* v. *Currard S.S. Co.,* 223 F.Supp. 273, aff'd 339 F.2d 295 (2nd Cir. 1964).

The foundation of plaintiff's entire argument under § 1331 or § 1350 is that the Warsaw Convention creates a cause of action for wrongful death, giving the Court original jurisdiction since the matter arises under the "laws and treaties" of the United States.

As Justice Cardozo stated in *Gully* v. *First Nat. Bank,* 299 US 109, 113, 81 L.Ed. 70 (1936):

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . ., and the controversy must be disclosed upon the face of the complaint unaided by the answer or by the petition for removal. . . ."

Accord:

Morrison v. *Jack Richards Aircraft Co.,* 328 F.Supp. 580 (WD OKL 1971).

The meaning of "to bring a case within the statute, a right or immunity . . . must be an element", was further clarified in *Anderson* v. *Bingham & G. Ry Co.*, 169 F.2d 328 (10th Cir. 1948), where the Court in considering whether a claim under the Safety Appliance Act was one arising under the "laws" of the United States, stated:

> ". . . But not every question of Federal law lurking in the background or emerging necessarily places the suit in the class of one arising under the laws of the United States, within the meaning of the statute. A suit having for its purpose the enforcement of a right which finds its origin in the laws of the United States is not necessarily and for that reason alone one arising under the laws of the United States. In order for a suit to be one arising under the laws of the United States within the meaning of the removal statute (a fortiori, a jurisdiction statute), it must really and substantially involve a dispute or controversy in respect of the *validity, construction, or effect* of such laws, upon the determination of which the result depends . . ." (Parentheses and emphasis added.)

Analogously, the Court in referring to the Act, held that:

> ". . . While it prescribes absolute duties and creates correlative rights . . ., it does not attempt to lay down rules governing actions for enforcing such rights. Instead, it leaves the nature, incidents, and regulation of the remedy to the law of the states. . . . An action of that kind has its genesis and regulation in the law of the state, either statutory or common law. . . ."

Again, in *Winsor* v. *United Air Lines Inc.*, 159 F.Supp. 856, 860 (D. Del. 1958), the Court in granting a motion to remand, stated:

> "While not directly on point the cited authorities by strong analogy suggest the conclusion that the source

> or substance of plaintiff's claim here is the Colorado Death Act and not the Warsaw Convention, and the fact that the Treaty may be drawn into construction during the course of the suit is not sufficient to sustain federal jurisdiction."

As a reading of the pleadings will readily disclose, the instant case does not involve the "validity, construction or effect" of the Warsaw Convention, nor does it present a "genuine and present controversy" with reference thereto.

POINT III

Jurisdiction cannot be obtained under § 1350.

Plaintiff postulates two theories for obtaining jurisdiction under § 1350. First, that the accident was a tortious violation of a "treaty"; secondly, that the accident was violative of the "law of nations".

Considering the second alternative first, it is clear that the negligence alleged herein, is not customarily treated as a violation of the law of nations. *Lopes* v. *Reederei Richard Schroder,* 225 F.Supp. 292 (ED Pa 1963).

As this Court recently stated in *Dreyfus* v. *Von Finck,* 534 F.2d 24, 30 (2nd Cir. 1976):

> "There has been little judicial interpretation of what constitutes the law of nations. . . . There is a general consensus, however, that it deals primarily with the relationship among nations rather than among individuals . . ."

The *Lopes* Court set forth a test to gauge a purported violation, which this Court reaffirmed in *IIT* v. *Vencap Ltd.,* 519 F.2d 1001 (2nd Cir. 1975):

> ". . . the conclusion of this court is that the phrase 'in violation of the law of nations,' for the purpose of deciding this issue, means, inter alia, at least a viola-

> tion by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se. Nothing has been found to indicate that the acts or omissions described as the negligence in this Complaint would be considered as a violation of the law of nations."

The pungent analogy in *IIT* v. *Vencap, Ltd., supra,* highlights the fault in plaintiff's thesis.

> ". . . While every civilized nation doubtless has this ('Thou shalt not steal') as a part of its legal system, a violation of the law of nations arises only when there has been a 'violation by one or more individuals of those standards . . .' ". (Parentheses added)

The matter here under consideration involves negligence affecting private citizens or companies, not the relationship of nations. Doubtless, the delicate sensibilities of civilized man are offended by a violent death due to negligence, but any more so, than by the offensiveness of the criminal, or more to the point, by injury due to the negligent maintenance or unseaworthiness of a ship. *Lopes* v. *Reederei Richard Schroder, supra.*

As earlier stated the foundation of plaintiff's argument is the claim that the Warsaw Convention, a treaty of the United States, creates a cause of action. Authority is clearly to the contrary.

The scope of § 1350 for which a tortious violation would warrant subject matter jurisdiction, must be narrowly defined. *IIT* v. *Vencap Ltd., supra.,* p. 1015. And as has been stated in *Dreyfus* v. *Von Finck, supra,* p. 31:

> "Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights. . . ."

The Court in *Zousman* v. *Canadian Pacific Air Lines Ltd., supra,* p. 900 stated:

> ". . . In the instant case, there is no right to recover for death created expressly either by the Warsaw Convention or regulations promulgated thereunder. Nor do the treaty and regulations relied on by plaintiff constitute an essential element of his case. They create, at most, the standards and presumptions of liability by which the conduct of the defendant is to be judged in a proper local action brought to recover damages for wrongful death. . . ."

However, even granting arguendo that the loss of baggage claim states a cause of action under the laws and treaties of the United States, and even further conceding that the monetary limit is not relevant, still there would be no subject matter jurisdiction, since the theory of the claim is not based on a tort only, but rather, is contractual in nature based on an alleged breach of a contract of carriage. Accordingly, § 1350 would not apply.

POINT IV

There can be no pendent jurisdiction if there is no substantial Federal issue.

Although plaintiff does not expressly argue the issue of pendent/ancillary jurisdiction, there is an extensive reference made in note 2, page 8 of plaintiff-appellant's brief. Furthermore, the issue was raised before the lower Court when plaintiff moved to serve the amended complaint (App. 79).

Inasmuch as the Warsaw Convention does not create a cause of action, plaintiff's claim does not "arise under" a treaty of the United States. Accordingly, there is no subject matter jurisdiction to warrant pendent jurisdiction.

United Mine Workers of America v. *Gibbs,* 383 US 822, 86 S.Ct. 1130 (1966).

In *United Mine Workers of America* v. *Gibbs, supra,* p. 1138, the Court laid down a general guide for determining pendent jurisdiction.

> ". . . . Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim arising under (the) Constitution, the Laws of the United States, and Treaties made . . ., and the relationship between that claim and the state claim permits the conclusion that the entire action before the Court comprises but one constitutional 'case'. The Federal claim must have substance sufficient to confer subject matter jurisdiction on the Court. . . . The state and federal claims must derive from a common nucleus of operative fact."

Therefore, jurisdiction is wanting where the claim set forth in the pleadings is plainly unsubstantial. *Levering & Garrigues Co.* v. *Morrin,* 289 US 103, 77 Ed 1062 (1933).

Thus the bootstrap argument that the baggage claim pleads a cause of action under § 1350, in addition to being untimely and below monetary jurisdictional limits, is also unsubstantial and made solely for the purpose of attempting to invoke Federal jurisdiction.

The language of *Levering & Garrigues Co.* v. *Morrin, supra,* p. 1066, bears on this later point. There petitioner sought an injunction barring a boycott which although local, indirectly affected interstate commerce. The Court stated:

> ". . . . It follows that the Federal District Court was without jurisdiction because the federal question presented was plainly unsubstantial, since it had, prior to the filing of the bill, been foreclosed by the two previous decisions last named, and was no longer the subject of controversy . . ."

This Circuit has previously held that Warsaw does not create a cause of action. Even granting arguendo that Art. 18 (Loss of Baggage) creates such cause of action, nevertheless, it is unsubstantial and invoked solely to attempt to gain Federal jurisdiction to which the wrongful death action will then attach. Simply stated, this is placing the proverbial "cart before the horse".

Lastly, although the separate causes of action seemingly arise out of a "common nucleus of operative facts", closer consideration will show that the "operative facts" allegedly supporting the claim against the carrier, are wholly different and distinct from those allegedly supporting the claim against the manufacturer. The only common fact is that plaintiff's decedent died in the crash of a BEA Trident aircraft. The operation and maintenance aspects are separate from and entirely independent of the design and development aspects. One will not support the claim of the other, nor indeed, do the same legal principles apply to each.

In the case at bar, the supposed Federal claim and non Federal claim do not comprise one constitutional case. Thus, this is not an appropriate case to invoke pendent/ancillary jurisdiction.

CONCLUSIONS

I

The Warsaw Convention does not create a cause of action, and its purpose is only to effect a uniformity of procedure and remedies; accordingly, the District Court lacks subject matter jurisdiction since the cause of action does not arise under a law or treaty of the United States.

II

§ 1350 applies to actions between nations, or individuals and nations, but not between individuals; accordingly, the statute does not apply to the instant action.

Furthermore, the sum demanded in the loss of baggage claim is below monetary jurisdictional limits. However, even granting *arguendo* that § 1350 applies, nevertheless, the claim for loss of baggage is contractual in nature, and therefore, not a tort only under the statute.

III

Since the claim does not arise under the laws and treaties of the United States, and further, since the matter does not present a substantial Federal issue there can be no pendent or ancillary jurisdiction over Hawker Siddeley Aviation, Ltd.

Respectfully submitted,

MENDES & MOUNT
Attorneys for Defendant-Appellee Hawker Siddeley Aviation, Ltd.
Office & P.O. Address
27 William Street
New York, N.Y. 10005
212—344-7100

JAMES J. FINNERTY, JR.
Of Counsel

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, Deceased,

Plaintiff-Appellant,

vs.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., & HAWKER SIDDELEY GROUP, LTD.,

Defendants-Appellees.

State of New York, County of New York, ss.:

Kenneth P. Riccardi
Mendes & Mount, Esqs. , being duly sworn deposes and says that he is agent the attorney for the above named Brief of Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 2821 W 12th St Bklyn, NY 11224

That on the 28 day of July , 1977 he served the within

BRIEF OF DEFENDANT*APPELLEE HAWKER SIDDELEY AVIATION, LTD.

upon the attorneys for the parties and at the addresses as specified below

Ronald L.M. Goldman, Esq.
Ronald L.M. Goldman & Associates
13737 Fiji Way
Marina del Rey, CA 90291
(213) 821-8886
Attorneys for Plaintiff-Appellant

by depositing Two true copies of the brief
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 28 day of July, 1977

Roland W. Johnson

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979

Kenneth P. Riccardi

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

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VS.

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Defendants-Appellees.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Bernard S. Greenberg being duly sworn,
deposes and says that he is over the age of 21 years and resides at 162 E. 7th St NY, NY

That on the 28 day of July 1977 at 99 Park Ave NY, NY and 1251 6th Ave NYC
he served the annexed Brief of Defendant-Appellee upon

Stanley J. Levy
Attorney at Law
Kreindler & Kreindler
99 Park Ave.
N.Y., N.Y. 10016
(212) 687-8181
Of Counsel for
Ronald L.M. Goldman & Assoc.

AND

George N. Tompkins, Jr., Esq.
Attorney at Law
Condon & Forsyth
1251 Ave. of the Americas
N.Y., N.Y. 10020
(212) 757-6870
Attorneys for Defendant-Appellee
British European Airways, Inc.

in this action, by delivering to and leaving with said attorneys
Two true briefs true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 28
day of July 1977

Roland W. Johnson

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979